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No. 97-1734

In the Supreme Court of the United States

OCTOBER TERM, 1997

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, prior to the adoption of 26 C.F.R. 1.501(c)-(5)-1(b), the foreign pension fund involved in this case qualified as a tax exempt "labor organization" under 26 U.S.C. 501(c)(5).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 129 F.3d 195. The opinion of the district court (Pet. App. A13-A33) is reported at 950 F. Supp. 373.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1997. The petition for rehearing was denied on January 23, 1998 (Pet. App. A34). The petition for certiorari was filed on April 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Dutch pension fund. All union and non-union employees in the hospital industry in that country are required to participate in that fund (Pet. App. A2). Under its articles of association and Dutch law, half of the members of petitioner's Board of Directors are appointed by organizations that represent employers and half are appointed by unions (*ibid.*). If fewer than all directors are present at a meeting of the Board, each side has only as many votes as the side with the fewer directors present (*id.* at A3). On all policy issues, the employer and union directors must reach an agreement, or no decision can be made by the Board (*ibid.*).

As of December 31, 1993, approximately 1,000,000 people were participants in petitioner's pension fund. Of this total, approximately 73,000 participants were currently retired and receiving pension payments. Approximately 333,000 were individuals who were not accruing benefits through current work but who, based upon past employment, will be entitled to pension benefits on reaching retirement age (Pet. App. A3).

Petitioner collects pension contributions from employers and employees, manages the investment of the contributions and pays benefits to the persons entitled to receive them (Pet. App. A3, A14). Petitioner is located in the Netherlands and does not engage in any trade or business within the United States (*id.* at A2). During 1993, petitioner received substantial income from investments in the United States. Custodial institutions in this country withheld and paid $8,567,408 in federal income tax before distributing

the balance of that income to petitioner (*id.* at A3, A15).

2. Petitioner brought this suit seeking a refund of the withheld taxes, claiming that it qualified as a tax-exempt "labor organization" under Section 501(c)(5) of the Internal Revenue Code, 26 U.S.C. 501(c)(5). The district court concluded, however, that neither the language of Section 501(c)(5), its legislative history nor the relevant regulations support petitioner's claim (Pet. App. A17-A20). The court noted, moreover, that petitioner's contention that a pension plan can qualify for tax-exempt status as a "labor organization" would undermine and circumvent the detailed rules that Congress enacted to govern pension plans in the Employee Retirement Income Security Act (ERISA) (*id.* at A29-A30).

The court also rejected petitioner's alternative argument that it is entitled to be treated as tax exempt under Section 7805(b) of the Code, 26 U.S.C. 7805(b). That statute merely specifies that the Secretary of the Treasury has discretion to determine "the extent, if any, to which any ruling or regulation * * * shall be applied without retroactive effect" (*ibid.*). The court concluded that, even though the Internal Revenue Service had incorrectly issued private rulings to two British pension funds that treated them as exempt from tax as "labor organizations," that did not require the Service to award a similarly incorrect ruling to petitioner (Pet. App. A31-A32).

3. The court of appeals affirmed (Pet. App. A1-A12). The court noted that the decisions of this Court have consistently held that a taxpayer seeking an exemption from tax has the burden of establishing "unambiguously" its entitlement to the exemption (*id.* at A4-A5). The court noted that the Internal Revenue Code

does not define the term "labor organization" in Section 501(c)(5) and that the legislative history also provides no clear guidance (Pet. App. A5). The court further observed that petitioner does not qualify as a "labor organization" as that term is described in the applicable regulation (26 C.F.R. 1.501(c)(5)-1(a)), although the court "decline[d] to decide the case on that basis" (Pet. App. A6). Finding no support for petitioner's claim in the Code or the regulation, the court of appeals looked to the revenue rulings on which petitioner sought to rely. The court noted the well established rule that a taxpayer cannot rely on a revenue ruling unless it is based on "facts and circumstances 'substantially the same' as this case" (*id.* at A7) and concluded that none of the rulings cited by petitioner qualifed under this standard (*id.* at A7-A8). The court pointed out, however, that Rev. Rul. 77-46, 1977-1 C.B. 147, *denied* a tax-exemption to a savings plan that was funded from money withheld from the pay of union members and was jointly controlled by the union and the employer. The court observed that this ruling "casts even more doubt on the Fund's claim" (Pet. App. A9). The court also rejected petitioner's attempt to rely on various General Counsel Memoranda (GCM) which, the court emphasized, were not precedential in character (*ibid.*).

The court of appeals rejected petitioner's efforts to rely on the decision of the Second Circuit in *Morganbesser* v. *United States*, 984 F.2d 560 (1993). The court of appeals held that *Morganbesser* is distinguishable from the present case because that case involved a pension plan organized under United States law (Pet. App. A9-A10). The court pointed out that "exempting foreign pension plans means that their earnings will escape all U.S. taxation" (*id.* at A8); by

contrast, "[e]arnings of exempt domestic funds * * * are taxed when benefits are paid to recipients" (*ibid.*). The court stated, moreover, that it disagreed with the underlying reasoning of *Morganbesser*, which incorrectly "relied on the precedentially dubious GCMs, never mentioning or applying the 'unambiguous' standard that we find controlling" (Pet. App. A10). The court stated, moreover, that, because of recently adopted Treasury regulations, "*Morganbesser* had a brief life" and is no longer prospectively applicable even in the Second Circuit (*ibid.*).

The court of appeals also rejected petitioner's alternative claim that it must be treated as exempt from tax simply because the Internal Revenue Service had issued (and subsequently revoked) private letters to two British pension funds treating them as exempt labor organizations. The court concluded that no statute or other authority stands for the proposition that "once the Service has treated one taxpayer a certain way, it must thereafter treat every similarly situated taxpayer exactly the same" (Pet. App. A11-A12). The court noted that petitioner erred in relying on *IBM Corp.* v. *United States*, 343 F.2d 914 (Ct. Cl. 1965), cert. denied, 382 U.S. 1028 (1966), which involved the particular situation in which different rulings were given to two direct competitors. That case is not relevant here, for petitioner does not compete with the two British pension funds (Pet. App. A11).

ARGUMENT

The decision of the court of appeals is correct and does not directly conflict with any decision of this Court or any other court of appeals. Moreover, because the Treasury has adopted a new regulation that governs this issue for all years after 1995, the ques-

tion presented in this case lacks prospective importance. Further review is therefore not warranted.

1. There is a "settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354 (1988). Accord, *United States* v. *Centennial Savings Bank*, 499 U.S. 573, 583 (1991); *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969); *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 606 (1943); *United States* v. *Stewart*, 311 U.S. 60, 71 (1940); *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939); *Trotter* v. *Tennessee*, 290 U.S. 354, 356 (1933); *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174, 183 (1889). The court of appeals correctly applied that principle in rejecting petitioner's claim that it was exempt from income tax as a "labor organization" under 26 U.S.C. 501(c)(5). As the court of appeals held (Pet. App. A5-A9), neither the language of the statute, its legislative history nor the governing regulations support petitioner's claim that a pension plan is a "labor organization."[1] See also note 3, *infra*.

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[1] Petitioner errs in relying (Pet. 20) on 26 C.F.R. 1.501(c)(5)-1(a)(2). That regulation generally sets forth the objects or purposes of all organizations that Congress contemplated as being exempt under Section 501(c)(5). The regulation does not purport to set forth criteria that, if satisfied, conclusively establish that an entity is a labor organization. For example, the fact that an organization may have as one of its purposes "the betterment of the conditions of those engaged in such pursuits" does not establish that the organization is a "labor organization" within the meaning of Section 501(c)(5). Indeed, the Treasury has now clearly specified by regulation that an organization such as petitioner cannot qualify as a "labor organization," for its "principal activity" is management

Petitioner contends (Pet. 15) that the court of appeals erred in relying on the settled principle that exemptions from tax must be established "unambiguously" for the taxpayer to prevail. According to petitioner, that "doctrine * * * would put the litigating positions of the IRS on exemptions beyond judicial review" (*ibid.*). This Court has consistently held, however, that it is the *taxpayer* who must prove that it is entitled to the special treatment that a tax exemption confers, for "taxation is the rule, and exemption the exception." *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. at 183. It is, moreover, obvious that this settled principle does not put the government's litigating position beyond judicial review. If the plain language of the statute or (when relevant) its legislative history unambiguously demonstrates that a taxpayer is entitled to an exemption, the government's litigating position would not be immune from review. As the court of appeals pointed out (Pet. App. A4-A9), the problem faced by petitioner is not that the government's interpretation of the statute is "beyond review"—it is that petitioner lacks suitable support for the proposition that a pension plan is a "labor organization."[2]

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of a "pension or other retirement savings plan[]" (26 C.F.R. 1.501(c)(5)-1(b)(1)). See page 9, *infra*.

[2] Petitioner errs in trying to find support for its exemption claim in GCMs (Pet. 13). As the court of appeals correctly held, those memoranda lack precedential value (Pet. A9). *Tupper* v. *United States*, 134 F.3d 444, 447 (1st Cir. 1998); *Disabled American Veterans* v. *Commissioner*, 942 F.2d 309, 315 n. 5 (6th Cir. 1991); *Old Harbor Native Corp.* v. *Commissioner*, 104 T.C. 191, 206-207 (1995). See also *Hernandez* v. *Commissioner*, 490 U.S. 680, 703 n.13 (1989). Moreover, for the reasons addressed in the briefs in the court of appeals—reasons that the

2. a. Petitioner errs in contending (Pet. 3) that the decision in this case directly conflicts with the decision of the Second Circuit in *Morganbesser* v. *United States*, 984 F.2d 560 (2d Cir. 1993).[3] As the court of appeals explained in this case, "[u]nlike this case, * * * *Morganbesser* involved a pension fund organized under U.S. law" (Pet. App. A9-A10). If a foreign pension plan were treated as a tax-exempt "labor organization," the tax scheme that Congress specifically devised for pension plans in ERISA would be circumvented. Under that scheme, income is exempted at the plan level (26 U.S.C. 401(a), 501(a)) but is taxed when distributed to the plan participant (26 U.S.C. 402). In the case of foreign pension plans, however, the participants are generally non-resident aliens from whom a tax on distribution either is not due or is impossible or impracticable to collect. See Mimeograph 71, 1952-2 C.B. 170; S. Rep. No. 1622, 83d Cong., 2d Sess. 55 (1954); H. R. Rep. No. 1337, 83d Cong., 2d Sess. A151, A166 (1954); I. Goodman, *The Unique Status of Foreign Pensions Offers Tax Advantages*,

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court of appeals found unnecessary to address—the GCMs are not consistent with petitioner's position in any event.

[3] The court in *Morganbesser* agreed with the court in the present case that neither the language of the statute (984 F.2d at 563), the regulations (*Id.* at 564) nor the case law (*Id.* at 562, 564) establishes that a pension fund is a tax-exempt "labor organization." The *Morganbesser* court erroneously concluded, however, that the "only real guidance for what qualifies as a labor organization is found in the GCMs issued by the IRS." *Id.* at 564. As the court of appeals held in this case (Pet. App. A9-A10), the inferences drawn in *Morganbesser* as to what the GCMs "suggest" (984 F.2d at 563) do not form a sufficient basis for concluding that pension plans are to be treated as tax-exempt "labor organization[s]." See note 2, *supra*.

11 J. Tax'n 30 (1959). As the court of appeals stated, "exempting foreign plans means that their earnings will escape all U.S. taxation. Earnings of exempt domestic funds, by comparison, are taxed when benefits are paid to recipients." The *Morganbesser* court did not address the additional issues involved in cases, such as the present one, that concern a tax-exemption claim of a foreign pension fund.

b. In any event, the question presented in this case lacks prospective importance. The court emphasized in *Morganbesser* v. *United States*, 984 F.2d at 564, that, if it had interpreted the term "labor organization" with too broad a meaning, the Treasury could restrict that definition prospectively by regulation. In July 1997, the Treasury did just that by adopting 26 C.F.R. 1.501(c)(5)-1(b), with an effective date of December 21, 1995. 62 Fed. Reg. 40,447-40,449 (1997). The new regulation specifies that "[a]n organization is not an organization described in section 501(c)(5) if the principal activity of the organization is to receive, hold, invest, disburse, or otherwise manage funds associated with * * * pension or other retirement savings plans or programs." *Ibid.* The new regulation thus makes clear that a pension plan (such as petitioner) does not qualify as a "labor organization" under Section 501(c)(5). As the court of appeals pointed out in this case, due to the adoption of this new regulation, "*Morganbesser* had a brief life" (Pet. App. A10).

3. Petitioner argues in the alternative that, even though it does not qualify as a "labor organization," it should nonetheless be treated as one (Pet. 25-29). Petitioner contends that it would be an abuse of discretion for the Treasury to deny it exempt treatment because two British pension funds received exempt

treatment in private letter rulings that were subsequently revoked (Pet. 25-29). That contention plainly lacks merit.

As the court of appeals noted (Pet. App. A11), it is well established that a taxpayer cannot rely on a private letter ruling issued to another taxpayer.[4] The case that petitioner cites (*IBM Corp.* v. *United States*, 343 F.2d 914 (Ct. Cl. 1965)) is readily distinguishable from this consistent authority, for it was based solely upon the concern that "direct competitors" should receive equal treatment. The *IBM* court, and the other courts of appeals, have consistently limited that decision to that particular factual setting and to "the particular circumstances in that case." *Knetsch* v. *United States*, 348 F.2d 932, 940 n.14 (Ct. Cl. 1965), cert. denied, 383 U.S. 957 (1996). See also *Collins Music Co.* v. *United States*, 21 F.3d 1330, 1336 (4th Cir. 1994); *Wilson* v. *United States*, 588 F.2d 1168, 1172 (6th Cir. 1978); *Anderson Clayton Co.* v. *United States*, 562 F.2d 972, 981 (5th Cir. 1977); *Shakespeare Co.* v. *United States*, 389 F.2d 772, 773 (Ct. Cl. 1968); *Bornstein* v. *United States*, 345 F.2d 558, 564 n.2 (Ct. Cl. 1965). The circumstance involved in *IBM* is plainly not present here, for petitioner is not a competitor of the British pension funds.

Moreover, as the court of appeals emphasized, it is not correct that, "once the Service has treated one

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[4] See, *e.g.*, 26 U.S.C. 6110(j)(3); 26 C.F.R. 601.201(l) and (m); *Educo, Inc.* v. *Alexander*, 557 F.2d 617, 619 (7th Cir. 1977); *Thrash* v. *O'Donnell*, 448 F.2d 886, 889 (5th Cir. 1971); *Shakespeare Co.* v. *United States*, 389 F.2d 772, 777 (Ct. Cl. 1968); *Minchin* v. *Commissioner*, 335 F.2d 30, 32-33 (2d Cir. 1964); *Weller* v. *Commissioner*, 270 F.2d 294, 298-299 (3d Cir. 1959), cert. denied, 364 U.S. 908 (1960); *Goodstein* v. *Commissioner*, 267 F.2d 127, 132 (1st Cir. 1959).

taxpayer a certain way, it must thereafter treat every similarly situated taxpayer exactly the same" (Pet. App. A11-A12). "[I]t is well established that the Commissioner [of Internal Revenue] may change an earlier interpretation of the law, even if such a change is made retroactive in effect. This rule applies even though a taxpayer may have relied to his detriment upon the Commissioner's prior position." *Dickman* v. *Commissioner*, 465 U.S. 330, 343 (1984) (citations omitted); *Dixon* v. *United States*, 381 U.S. 68, 72-75 (1965).

4. Finally, petitioner raises in this Court a new claim that was not presented in the proceedings below. Petitioner asserts here that, by not treating it as a tax-exempt labor organization after it incorrectly treated two British pension funds as tax-exempt, the Service has "violate[d] Article XI(3) of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands" (Pet. 29). That claim, however, was not raised in the proceedings below and was not presented in the administrative claim for refund. It is therefore not properly before this Court.[5] See *United States* v. *Felt & Tarrant Mfg. Co.*,

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[5] In a petition for rehearing and suggestion for rehearing en banc in the court of appeals (at 9-10), petitioner argued that "[t]he Panel decision erroneously suggests that a different 501(c)(5) standard may apply to foreign, as opposed to domestic entities" and stated that "a more burdensome standard could well violate income tax treaty obligations of the United States." This vague statement was not sufficient to raise a claim that any specific treaty had been violated. Moreover, a claim can not properly be raised for the first time in a petition for rehearing. *FDIC* v. *Massingill*, 30 F.3d 601, 605 (5th Cir. 1994);

283 U.S. 269, 272 (1931); *Sun Chemical Corp.* v. *United States*, 698 F.2d 1203, 1206 (Fed. Cir.), cert. denied, 464 U.S. 819 (1983). Cf. *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 397 (1990). "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362 (1958); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 61 n.10 (1996); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). There are no exceptional circumstances present here to permit petitioner to raise its treaty claim for the first time in this Court.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Costo v. *United States*, 922 F.2d 302, 303-304 (6th Cir. 1990); *United States* v. *Lewis*, 798 F.2d 1250 (9th Cir. 1986).

[6] In any event, petitioner's new treaty claim lacks merit. As petitioner concedes, the pension "plans of such entities as British Petroleum and Unilever" are currently litigating "the same [tax exemption] issue" that petitioner asks this Court to review (Pet. 6 n.5). It is thus evident that the United States is not discriminating in favor of British companies.